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No.

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1984

ROSE HALL LIMITED,
Petitioner

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION OF ROSE HALL LIMITED FOR A WRIT OF CERTIORARI

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Petitioner Rose Hall Limited respectfully asks that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Do the provisions of the Federal Reserve Act, 12 U.S.C. §§ 601-32, and the regulations adopted thereunder, permit an "Edge corporation" organized under those provisions to interpose the separate corporate existence of a wholly owned subsidiary to avoid the imposition of responsibility for a wrong committed in its foreign banking operations?

2. Do the equitable duties to creditors enunciated in *Pepper v Litton*, 308 U.S. 295 (1939), and *Federal Deposit Insurance Corp. v. Sea Pines Co.*, 692 F.2d 973 (4th Cir. 1982), here permit an Edge corporation to interpose the separate corporate existence of a wholly owned subsidiary to defeat a third party's collection of a judgment for the subsidiary's wrong, after the subsidiary was made judgment-proof by distributing its assets to affiliated corporations despite the third party's known claim?

3. Does the doctrine immunizing participants in judicial proceedings from damage liability for their conduct, enunciated in *Briscoe v. Lahue*, 460 U.S 325 (1983), extend so far as to prevent deception of a court from providing a basis for piercing the corporate veil to hold an Edge company responsible for its subsidiary's wrong when — the deception defeated an injunction of the subsidiary's wrong by leading the court to conclude that damages would be an adequate remedy against the subsidiary, and the subsidiary was thereafter rendered judgment-proof by stripping it of assets pursuant to a plan in existence at the time of the injunction proceedings?

Parties Below: Petitioner Rose Hall Limited was plaintiff in the district court and appellant/cross-appellee in the court of appeals. Rose Hall Limited is a wholly

owned subsidiary of Rollins Jamaica Limited which is, in turn, wholly owned by an individual. Respondent Chase Manhattan Overseas Banking Corporation was defendant in the district court and appellee/cross-appellant in the court of appeals. The only other party below was Holiday Inns, Inc. which, petitioner believes, has no interest in the outcome of this petition.

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Reported Opinions below: The opinion for which this petition seeks review is *Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.*, 576 F. Supp. 107 (D. Del. 1983), *aff'd on op. below* (3d Cir. July 13, 1984), *reh'g denied* (3d Cir. Aug. 14, 1984) (hereinafter the "Opinion" or "Opinion below") (A-3-129) [The Appendix to this petition is thus cited throughout]. Three other similarly

captioned opinions are at 566 F. Supp. 1558 (D. Del. 1983), 93 F.R.D. 858 (D. Del. 1982), and 494 F. Supp. 1139 (D. Del. 1980).

Jurisdiction Of This Court: This petition seeks review of the July 13, 1984 Judgment Order of the United States Court of Appeals for the Third Circuit in *Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.*, No. 83-1845 (A-1). On July 27, 1984, Rose Hall timely petitioned for rehearing, which was denied by Order of August 14, 1984. This Court has jurisdiction under 28 U.S.C. §1254(1).

Statutes, Ordinances, and Regulations: This case involves 12 U.S.C. §§601, 611 and 632, Federal Reserve Board Regulations M, 12 C.F.R. §213.104 (1973-79), and K, 12 C.F.R. §211.7 (1980). These materials are printed in the Appendix.

STATEMENT OF THE CASE

The jury below determined that a foreign bank's foreclosure sale of plaintiff's collateral was wrongful, causing $6 million of damage. The findings involved in that determination have been sustained by the courts below. However, those courts rejected several grounds rooted in federal law, and a related jury finding, for holding the defendant, which was the foreign bank's parent company, liable for the wrongful sale by the foreign bank, which was stripped of its assets and made judgment-proof following the sale.

The foreign bank is Chase Merchant Bankers Jamaica, Ltd., a Jamaican company ("Chase Jamaica"). The defendant, which owned all Chase Jamaica's stock, is the respondent Chase Manhattan Overseas Banking Corporation ("CMOBC"), which is in turn a wholly owned subsidiary of Chase Manhattan Bank N.A ("Chase"). CMOBC is an "Edge Act" corporation, chartered under the Federal Reserve Act, 12 U.S.C. §§601 *et seq.*

An Edge corporation such as CMOBC is authorized to engage in foreign banking, either through branches or subsidiaries. Under 12 U.S.C. §632, all suits against such corporations "arising out of . . . international or foreign operations, either directly or through the agency, ownership, or control of branches or local institutions . . . shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits . . ."

The plaintiff below is the petitioner here, Rose Hall Limited ("Rose Hall"), a Cayman Islands company. Rose Hall is wholly owned through another company by an individual who resides in Delaware.

Federal jurisdiction in the court of first instance below, the United States District Court for the District of Delaware, was founded on 12 U.S.C. §632. Alternatively, it was based on 28 U.S.C. §1331, because the action arose under federal statutory and regulatory provisions governing the foreign banking operations of Edge companies, as well as on 28 U.S.C. §1332, because Rose Hall is a foreign corporation while CMOBC's home office is in Newark, Delaware.

In 1976, Rose Hall was in default on a loan of approximately $3 million from Chase Jamaica, which held as security a mortgage on 3,000 acres of Rose Hall's land and a pledge of all the stock of Rose Hall's wholly owned subsidiary, Rose Hall (H.I.) Limited ("Rose Hall (H.I.)"). Rose Hall (H.I.) owned a hotel which was under long-term lease to a subsidiary of Holiday Inns, Inc. ("Holiday Inns") (3318a) [The Appendix to the brief in the third circuit is thus cited throughout]. Rose Hall arranged a sale of the hotel property without the 3,000 acres, at a price which would have netted for the seller substantially more than the Chase Jamaica debt, but that sale aborted because of wrongful interference of Holiday Inns, which was maneuvering for relief from the terms of its subsidiary's lease of the hotel (A-6-7). Chase Jamaica then foreclosed, by an unadvertised private sale, on all the Rose

Hall collateral, including the 3,000 acres, to Urban Development Corporation ("UDC"), an agency of the Jamaican government (3462a), at a net price which was the precise amount of Rose Hall's debt (2043a; 3550a; 3951a).

When the Chase Jamaica collateral sale was first threatened, Rose Hall filed suit in the Supreme Court of Judicature of Jamaica to enjoin the sale as involving a grossly inadequate price (3480a). Chase Jamaica resisted an application for a preliminary injunction by arguing that, because Rose Hall itself had the collateral up for sale, money damages would provide an adequate remedy (3494a). When the future ability of Chase Jamaica to respond to money damages was questioned, it was represented to the Jamaican court, through the testimony of a witness and the argument of counsel, that Chase Jamaica had no plans to shut down and that it was and would remain able to respond to damages because of its substantial assets and the backing of its parent company. The injunction was denied on the ground of the adequacy of money damages, and Chase Jamaica's sale of the collateral proceeded.

Promptly after completing the sale, Chase Jamaica was closed and made judgment-proof by a distribution of its assets in payment of indebtedness to affiliated corporations, primarily to Chase, the grandparent corporation (1385-88a; 3551a; 3564a; 3577a; 3578a). This was done notwithstanding that in the injunction proceedings the Jamaican court was told, according to the testimony below of Rose Hall's barrister in those proceedings (1612a):

> . . . that the defendant [Chase Jamaica] was part of a great organization of bankers, that its present revenue position was a temporary situation, that it intended to continue in business and its position would, in fact, improve, that it would have the backing of its overseas parent company, and that for this reason or for these reasons *there was absolutely no danger* of

> the plaintiff being faced with a position in which he could not recover damages. [Throughout this petition, unless otherwise noted, emphasis in quoted matter is added.]

Chase Jamaica's own barrister confirmed in testimony below that "the gist of the presentation" before the Jamaican court had been that "the situation was such that the court really ought not to entertain any doubt about [Chase Jamaica's] ongoing solvency" (2442a). Evidence adduced at trial below showed that when the Jamaican court was given this advice, plans to close and empty Chase Jamaica were in place (3518a).

Simultaneously with its Jamaican suit Rose Hall also brought suit in the state courts of Georgia against Holiday Inns and a Georgia resident who was its agent in these matters, seeking damages for the wrongful interference with Rose Hall's earlier proposed sale of the hotel for more money (1323a; 5173a). That suit was ultimately dismissed because the subject of that proposed sale had been the hotel itself, rather than the stock of Rose Hall (H.I.) which owned the hotel, so that the interference cause of action was owned by Rose Hall (H.I.), and not its parent, Rose Hall (1324a; 3954a).

Chase Jamaica caused that loss of the interference claim (A-63-64). At the outset of the Georgia action, Rose Hall had urged Chase Jamaica, which then still controlled Rose Hall (H.I.), to authorize the use of the name of Rose Hall (H.I.) as plaintiff, or to cast that part of its collateral sale in the form of a sale of the hotel asset rather than of the Rose Hall (H.I.) shares, so that Rose Hall (H.I.), with the interference claim, could be preserved for Rose Hall (1313-17a). However, Chase Jamaica insisted on a sale of the Rose Hall (H.I.) shares and 3,000 acres (A-8)—thus throwing away the interference claim. UDC had no interest in the claim against Holiday Inns (1671a), and paid no value for it (2138a).

In April, 1979, after appeals in the Georgia courts had run their course, Rose Hall brought suit below in the United States District Court for the District of Delaware against CMOBC.[1] After filing the Delaware suit, Rose Hall sought from the Jamaican court a stay of the damage phase of that action (3504a). In resisting that stay, Chase Jamaica tendered to the court an undertaking of CMOBC, which was not itself subject to jurisdiction in Jamaica, to assume some responsibility for any judgment against Chase Jamaica (1400-02a; 3898a; 4286a). However, the Jamaican court concluded the undertaking was "hedged and bristled with such a condition that it makes what is proffered as worthless" and that the offering of it "shows signs that it was more calculated to obstruct the course of justice than to achieve it" (A-151). In staying its damage proceedings, the Jamaican court found that a damage judgment against Chase Jamaica would be meaningless (A-147-148) and approved Rose Hall's pursuit of CMOBC under American law (A-146-148).[2]

In the Delaware case, Rose Hall asserted that CMOBC could be held liable for Chase Jamaica's wrongful sale of the collateral on several grounds, under the federal law made applicable by the provision of 12 U.S.C. §632 that suits against Edge companies "shall be deemed to arise under the laws of the United States" (p. 3,

1. Holiday Inns was also named as a defendant. However, the court below determined preliminarily that the interference claim was *res judicata* under the Georgia judgment, and on the other claim asserted the jury found Holiday Inns had not conspired with Chase Jamaica concerning its sale of the collateral.

2. CMOBC conceded below by silence that its control of and involvement in the Jamaican stay proceedings bind CMOBC by collateral estoppel to the Jamaican court's decision that there remained no meaningful remedy for Rose Hall in Jamaica (*See* Dkt. 868, pp. 76-77). *Restatement (2d) of Judgments* §39. That decision, and a similar decision in Delaware (1175-76a), caused the case to be tried to conclusion in Delaware, at vast expense, because courts of both nations held it should be.

supra). The courts below acknowledged, in a sense, the applicability of United States law, although they failed in the end to apply it. The district court said, "the liability of CMOBC, as a stockholder, for the wrongs of its subsidiary is governed by the laws of the United States" (A-24) and, on another occasion, "the United States has a significant policy interest in the application of its law" as to "liabilities of Edge Act corporations" (A-137).

After a lengthy trial, the issues were put to the jury by special interrogatories under Rule 49(a) of the Federal Rules of Civil Procedure. The jury specifically found (a) that Chase Jamaica had breached its duty to Rose Hall in the sale of the collateral; (b) that Holiday Inns had wrongfully interfered with Rose Hall's sale of the hotel and that Chase Jamaica's wrong had deprived Rose Hall of its remedy against Holiday Inns; and (c) that Rose Hall's resulting damages were $6 million (A-11-12).[3]

The jury also found, "Chase Jamaica, through its representations, as a result of its control by CMOBC, [did] deceive the Jamaican court into not enjoining the sale of the collateral" (A-12) — in which event, the court had instructed the jury, "the corporate separateness of the no longer financially substantial subsidiary could [not] be used to defeat Rose Hall's claim" (A-36, n.27). On the basis of the jury's verdict, a judgment was initially entered in favor of Rose Hall against CMOBC for $6 million plus interest.

Upon motion for judgment notwithstanding the verdict, a successor judge (the trial judge having become disabled after the verdict), while upholding the jury's findings concerning Chase Jamaica's wrongful conduct, overturned the judgment on the ground that CMOBC could not be held liable. In so ruling, the court extended

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3. In addition, the jury found that CMOBC had not controlled Chase Jamaica's actions in selling the Rose Hall collateral, but this was after a special instruction, in response to a question, that CMOBC's "control in the general (or overall) sense may be, but is not necessarily, relevant . . . " (A-50, n.46).

the principle of *Briscoe v. Lahue*, 460 U.S. 325 (1983), by holding that the immunity there involved foreclosed the piercing of the corporate veil, to hold a parent corporation liable for its subsidiary's wrong, on the basis of a court's deception in preliminary injunction proceedings. Moreover, in its ruling, the court did not follow the teachings of *Pepper v. Litton*, 308 U.S. 295, 306-13 (1939), and *Federal Deposit Insurance Corp. v. Sea Pines Co.*, 692 F.2d 973 (4th Cir. 1982), that a parent corporation can be held responsible for the liability of its subsidiary when, as here, the subsidiary has been depleted of assets by payment of indebtedness to affiliated corporations with knowledge of the third party's claim. In addition, the court repeated an earlier ruling that the provisions of the Federal Reserve Act and regulations, contemplating an Edge corporation's control of its foreign banking activities whether conducted by a branch or a subsidiary, do not themselves make the Edge parent company responsible for the wrong of its subsidiary; rather, the court ruled, those provisions only give rise to a presumption which can be rebutted by a showing that the Edge company had not actually exercised the control of its subsidiary called for by the statute and regulations. The Court of Appeals for the Third Circuit affirmed those rulings on the basis of the district court opinion.

ARGUMENT

I. THE DECISIONS BELOW DISREGARD THE IMPORTANT FEDERAL POLICY MAKING "EDGE ACT" CORPORATIONS RESPONSIBLE FOR THEIR FOREIGN BANKING OPERATIONS NO MATTER WHETHER CONDUCTED THROUGH A BRANCH OR A SUBSIDIARY.

CMOBC was organized in 1962 under §25(a) of the Federal Reserve Act (2268a). That Act, as amended by the Edge Act of 1919, authorizes formation of "Edge cor-

porations" to pursue international banking from a head office in the United States, through subsidiary corporations and/or branches. 12 U.S.C. §§601-32. The Act expressly contemplates the Edge corporation, not as a passive holding company, but as an operating company which is itself engaged in the international banking. For example, an Edge company is authorized to be formed only "for the purpose of *engaging in* international or foreign banking . . . either directly or through the agency, ownership, or control of local institutions in foreign countries." 12 U.S.C. §611.

Not only is CMOBC part of the United States banking system, but so is Chase Jamaica. Consent of the Federal Reserve Board is required to establish a subsidiary such as Chase Jamaica (PX3), and general control of the overseas operations by the Edge corporation is specifically contemplated, whether they are conducted through a branch or a subsidiary. Thus, Federal Reserve Board regulations spell out a duty "to supervise and administer" the "operations" of "subsidiaries" of Edge corporations and to establish appropriate "controls" for that purpose. Regulation M, 12 C.F.R. §213.104, in effect from 1973 through 1979, (A-159-61) provided:

> (b) [T]he Board believes it incumbent upon member banks [Edge companies] to *supervise and administer their* foreign branches and *subsidiaries* in such a manner as to assure that their operations are conducted at all times in accordance with high standards of banking and financial prudence.
>
> (c) Proper administration and supervision of foreign branches and subsidiaries require the use of effective systems of records, controls and reports. . . . At a minimum, such systems should provide the following:
>
> * * *
>
> (4) *Controls* . . . Such reports should cover . . . (iv)

> conformance to head office guidelines on loans, . . . (v) compliance with local laws and regulations; and (vi) compliance with *applicable U.S. laws and regulations*.

Similar provisions exist today. *See* Regulation K, 12 C.F.R. §211.7 (1980) (A-162-164). Indeed, the subsidiary form has been used for overseas operations of Edge corporations only "where legal impediments precluded the establishment of direct branches. In these cases, the subsidiaries are pure substitutes for branches and are for the most part operated as if they were branches." Dahl, "International Operations of U.S. Banks," *Law & Contemporary Problems* 100, 111 (Winter 1967).

That the statute and regulations contemplate an Edge corporation's responsibility for its foreign operations is specifically reflected in 12 U.S.C. §632 (A-155). It expressly applies to make U.S. law govern and to confer jurisdiction on U.S. courts as to foreign banking transactions of Edge corporations conducted through a branch or through the "ownership, or control . . . of local institutions":

> Notwithstanding any other provision of law, *all suits* of a civil nature at common law or in equity *to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking*, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, *either directly or through the agency, ownership, or control of branches or local institutions* in dependencies of insular possessions of the United States or in foreign countries, *shall be deemed to arise under the laws of the United States, and the district court of the United States shall have original jurisdiction* of all such suits.

The courts below disregarded the full significance of these provisions. They ruled that §632 "is simply a jurisdictional provision" and merely "provides Rose Hall a forum to determine if the circumstances warrant a finding of whether the separate corporate status of CMOBC and Chase Jamaica should be disregarded" (A-106; A-107). Such a view seems excessively narrow, since jurisdiction to apply conventional tests concerning piercing the corporate veil surely exists wholly apart from §632. 13 Wright, Miller & Cooper, *Federal Practice & Procedure* §3624 (Cumulative Supp. 1980).

More broadly, the courts below ruled the regulatory requirement that Edge companies "supervise and administer their foreign branches and subsidiaries in . . . their operations" is not a requirement "tantamount to control" but "simply serves an informational and regulatory purpose to ensure the financial health of the Edge Act corporation" (A-103). This approach hardly serves the policy underlying the Act and regulations, in that the rulings permit the Edge corporation to escape liability for foreign operations by showing that it failed to fulfill the responsibility of controlling those operations, which the Act and regulations vest in the Edge company.

The ultimate issue is whether the U.S. courts in their rulings should encourage conformity with such federal regulatory policies. This in turn involves consideration of the question whether the federal regulations here mean what they say in providing that Edge companies shall "supervise and administer their foreign branches and subsidiaries in . . . their operations" or whether Edge companies will be permitted on their own, by selecting the form in which they conduct foreign operations, to determine if they are to have responsibility for those operations. In the light of the burgeoning off-shore activities of American banks, this is a matter, we submit, calling for the definitive attention of this Court.

II. EQUITABLE PRINCIPLES APPLICABLE TO FEDERALLY CHARTERED BANKS PRECLUDE AN EDGE CORPORATION FROM ASSERTING LIMITED LIABILITY, WHERE ITS SUBSIDIARY WAS MADE TO DISTRIBUTE ITS ASSETS PREFERENTIALLY TO ITS OWN AFFILIATES AS CREDITORS, LEAVING NOTHING FOR AN OUTSIDE CREDITOR.

A. *The importance of the issues involved here warrants this Court's review*: Equitable disregard of corporate entities, while not lightly or routinely used, is an important power of the federal courts. It comes up here in a significant federal banking context, and questions about it are not rare in such federal contexts as taxation, securities litigation, bankruptcy, labor regulation railroad regulation and antitrust. *See Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703 1974; *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 402-04 1960. The district court below has elsewhere pointed to the oft-noted need for clarification of this power. *See, eg., Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 839 (D. Del. 1978) (the cases are not "uniform or clear," but enveloped in "mists of metaphor" and there is "confusion in this area"). Clarifying this judicial power and its remedial flexibility, and correcting the injustice here, all merit this Court's attention.

The Opinion below sees nothing wrong in preferentially paying off affiliate debt and leaving Rose Hall remediless (A-40). By approving the Opinion, the third circuit (a) rejects *FDIC v. Sea Pines Co.*, 692 F.2d 973, 976 (4th Cir. 1982), *cert. denied*, ____U.S.____103 U.S.L.W. 3825 (1983), and *United Rubber Workers v. Great American Industries, Inc.*, 479 F. Supp. 216, 245-46 (S.D.N.Y. 1979), both of which recognize that fiduciary responsibilities forbid this, and (b) disregards this Court's applicable teachings in *Pepper v. Litton*, 308 U.S. 295, 306-13 (1939). See pp. 14-16, *infra*. If banks,

other federally chartered entities, and other corporations liable on disputed federal law claims can get away with preferentially emptying entities via "debt" to affiliates, defeating collection of valid but contested claims of outsiders, the signal to the world about our system of justice is plain.

B. *The stripping of Chase Jamaica made it gravely inequitable for CMOBC to assert limited liability*: On this issue the Opinion rejected Rose Hall's analysis, but recognized that "if one started with Rose Hall's statement of the issue . . . the American rule on witness immunity" does apply, holding that it "precludes this suit as presented" (A-34).[4] On any analysis of the equities here, the injustice of leaving Rose Hall remediless is plain and raw. Indeed, even CMOBC has not openly urged any court to stomach the idea that after the stripping of Chase Jamaica justice or equity permits leaving Rose Hall remediless; CMOBC has repeatedly suggested in Jamaica and

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4. There was confusion about choice of law below. The Opinion, laboring under its mistaken premise that Rose Hall's effort to disregard corporate entities was an effort to assert an "independent cause of action against" CMOBC (A- 52) for a tort consisting of the false testimony given in Jamaica, reasoned that Jamaican law would govern the existence of such a tort (A-24-25). There is no such issue, since Rose Hall's analysis has nothing to do with tort liability against witnesses or lawyers (pp. 21-23, *infra*). Assuming, *arguendo* and contrary to our view, that any subsidiary issue of Jamaican immunity law could be involved, that law is the common law. Jamaica is a British Commonwealth country, and appeals lie from its highest court to Her Majesty in Privy Council at London. Jamaican courts follow English common law and principles of equity (A27, n.22; 566 F. Supp at 1571n) -- which are the basis of our own jurisprudence, and do not differ from American law on any point material to this petition. United States immunity law is also the common law; in *Tower v. Glover*, ____U.S. ____, 81 L.Ed.2d 758, 765 (1984), this Court pointed out that "immunities in this country have regularly been borrowed from the English precedents . . ." and the Opinion below says "the rationale for the American [immunity] rule is largely the same as that for the English rule" (A-37). *See Briscoe v. Lahue*, 460 U.S. 325, 330-31 (1983).

below that it would pay a judgment rendered against Chase Jamaica in Jamaica. However, when the point was important in the Jamaican stay proceedings, CMOBC imposed conditions which made its commitment worthless (p. 6, *supra*).

This Court discussed the governing equitable principles in *Pepper v. Litton*, *supra*, holding that a controlling stockholder is a fiduciary whose "dealings with the corporation are subject to rigorous scrutiny," a "standard of fiduciary obligation designed for the protection of the entire community of interests in the corporation — creditors as well as stockholders" (308 U.S. at 306-07). The Court explained that in some cases "so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholder," and that "these cases do not turn on the existence or non-existence of the debt" but "involve simply the question of order of payment" and, for such reasons, "at times equity has ordered disallowance or subordination by disregarding the corporate entity" (308 U.S. at 309-10).

Regardless of the degree of CMOBC's control over Chase Jamaica (pp. 27-30, *infra*), the "tests of honesty and justice" apply,[5] and they are conventionally articulated in the broad statement that entities are disregarded whenever it is necessary to prevent "fraud, illegality or injustice," *e.g.*, *Publicker Industries v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979); *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981), a formulation

5. In *N.L.R.B. v. Deena Artware, Inc.*, *supra*, 361 U.S. at 403, this Court approvingly quoted Justice Cardozo's statement elsewhere that "dominion may be so complete" as to create agency, and "where control is less than this, we are remitted to the tests of honesty and justice." Indeed, entities may be disregarded even where an entity inherently had *no* control — a subsidiary may be held responsible for acts of its parent. *See FMC Finance Corp. v. Murphree*, 632 F.2d 413, 422-23 (5th Cir. 1980).

consistent with the remedial flexibility most courts recognize.[6]

Thus, the district court's expression "remotely approaching fraud" (A-40) is inadequate; the test for disregard of entities is "fraud, illegality *or injustice*," in the context of CMOBC's fiduciary duty under *Pepper v. Litton*, *supra*. It should not matter whether the injustice to Rose Hall was "the aim or only the result of the arrangement." *Anderson v. Abbott*, 321 U.S. 349, 363 (1944).[7] For instance, *Texas Co. v. Roos*, 93 F.2d 380, 382-83 (5th Cir. 1937), disregarded entities where the subsidiary was inequitably emptied by a dividend, despite assertions that this was motivated by tax considerations, with no intent to defraud plaintiff. The court rejected

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6. Typical is *FMC Finance Corp. v. Murphree*, *supra*, 632 F.2d at 422 ("because the doctrine is essentially equitable in character, the conditions under which a corporate entity may be disregarded vary, depending upon the circumstances . . . It is therefore inappropriate to attempt to apply any verbalization of the test in a mechanical manner"). *Accord*, *Talen's Landing Inc. v. M/V Venture*, 656 F.2d 1157, 1161 n.6 (5th Cir. 1981) ("Although there are general rules . . . each case is *sui generis*"); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684 (4th Cir. 1976) (same); *Edwin D. Williams & Co., Inc. v. Edwin K. Williams & Co. — East*, 542 F.2d 1053, 1063 (9th Cir. 1976) cert. denied 433 U.S. 908 (1977) ("There are no inflexible tests by which courts determine when to hold corporations liable for the acts of their subsidiaries . . . Each case must be considered on its own facts).

7. In *Anderson* this court said that "the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim *or only the result* of the arrangement." This teaching is not limited to legislative policies; regardless of the "aim," interposition of a corporation should not defeat *judicial* corrective powers described at pp. 19-21, *infra*, where the "result" of corporate arrangements is that a court's jurisdiction has been defeated, and a damaged plaintiff's normal remedy in that court has been destroyed. *Cf. Linn & Lane Timber Co. v. United States*, 236 U.S. 574, 577-78 (1915) (entities disregarded to defeat inequitable assertion of statute of limitations). Indeed, the "overriding public policy" this Court applied to disregard entities in *Bangor Punta*, *supra*, consisted of equitable principles governing rights among private parties.

this as "immaterial," holding that "both corporations are presumed to have intended to defraud [plaintiff] and defeat the payment of his claim," because "a person is presumed to intend the natural and probable consequences of his act." Moreover, in *Pepper v. Litton*, *supra*, this Court said that even absent the planned fraudulent scheme found there, the "dominant influence" in a company could not be allowed to "manipulate its affairs in such a manner that when one of its creditors came to collect her just debt the bulk of the assets had disappeared into another Litton company" (308 U.S. at 311-312).[8]

The Opinion's narrowly technical statement "that CMOBC did not in any way profit or receive any assets from the 'stripping' " (A-39) is similarly immaterial; it disregards the admitted fact that CMOBC's only purpose as to Chase Jamaica was "to do what the International Department of Chase Manhattan Bank, N.A. wants" (1439a), so that Chase Jamaica's repayment of millions to Chase served CMOBC's only real self-interest, as fully as if CMOBC received the assets itself.[9] Thus, in *FDIC v. Sea Pines Co.*, *supra*, the court disregarded entities because of a breach of "fiduciary duty by stripping the sub-

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8. In equity, fraud is "equitable fraud" which "includes *all* acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and are injurious to another, *or* by which an undue or unconscientous advantage is taken of another," *McFadden v McFadden*, 139 A.2d 774, 776-77 (N.J App.) *cert denied*, 141 A.2d 828 (N.J 1958). The latter part of that test includes "constructive fraud," which "irrespective of moral guilt the law declares fraudulent," *Italo Petroleum Corp v. Hannigan*, 14 A.2d 401, 407-08 (Del. 1940).

9. Indeed, controlling parties having fiduciary obligations are not normally treated as disinterested in dealings involving their close relatives or affiliates. *See, e.g., Pension Benefit Guaranty Corp v. Greene*, 570 F. Supp 1483, 1493-94 (W.D Pa. 1983); *Sinclair Oil Corp v. Levien*, 280 A.2d 717, 723 (Del. 1971) ("Sinclair's act of contracting with its dominated subsidiary was self-dealing", although contract was formally with another subsidiary, not Sinclair itself).

sidiary of its assets, when it became insolvent, for the benefit of the parent," pointing out that those who control a failing corporation "become trustees for the creditors, and . . . cannot by transfer of its property or payment of cash, prefer themselves *or other creditors*" (692 F.2d at 977); *see Allied Chemical Corp. v. Randall*, 321 F.2d 320, 323 (7th Cir. 1963) (controlling individual liable, where debtor corporation stripped by transactions with his other corporations); *United Rubber Workers v. Great American Industries, Inc., supra*, 479 F. Supp. at 245-46 (parent or grandparent corporation may not use fiduciary position "to gain a preference over other creditors of its subsidiary", and intent to accomplish such a preference was "a fraudulent intent"). Here, because the emptying of Chase Jamaica gave affiliate "debt" such an illegitimate preference, it meets the test of being "unjust and fundamentally unfair" to Rose Hall under *Sea Pines*, justifying disregard of entities without more (692 F.2d at 978).

In the final analysis, it was CMOBC's liquidation of Chase Jamaica that destroyed Rose Hall's damages remedy against Chase Jamaica. *See* Powell, *Parent & Subsidiary Corporations* 85-86 (1931) ("If the parent corporation has caused the subsidiary to be removed from the complainant's jurisdiction, *or in any other manner* has impeded or prejudiced the enforcement of the complainant's remedies, it should be held accountable in the first instance. Dissolution of the subsidiary should have the same result"). Just as CMOBC had regulatory obligations to supervise and administer Chase Jamaica (p. 9, *supra*), as sole stockholder, it had the fiduciary duties which the liquidation of Chase Jamaica breached. Ballantine, *Corporations* §141 (Rev. ed. 1946) (black letter that "a holding company has a fiduciary obligation toward minority . . . [stockholders of subsidiary] and also to its creditors"). For all these reasons CMOBC's assertion of limited liability is grossly inequitable to Rose Hall, and the entities should be disregarded to hold it liable.

III. THE OPINION BELOW APPLIED THE COURTROOM IMMUNITY WITH UNPRECEDENTED BREADTH, RESTRICTING OR DESTROYING LONG-RECOGNIZED REMEDIAL POWERS OF FEDERAL COURTS.

A. *The importance of this question warrants this Court's review:* This Court addressed the familiar immunity of lawyers, witnesses and parties from civil damages liability for courtroom statements in *Briscoe v. Lahue*, 460 U.S. 325 (1983), and *Imbler v. Pachtman*, 424 U.S. 409, 426 n.23, 438-40 (1976). This immunity bars suits attempting to state new or independent causes of action for courtroom statements, but the Opinion below, without precedent, extended the immunity to cut off Rose Hall's remedy on its underlying cause of action for wrongful sale of its property. This extension makes the immunity curtail important powers of federal courts, long recognized by this Court, to shape or extend their remedies in response to deception of the court (pp. 19-20, *infra*). Indeed, if the immunity limits the remedy on such an underlying claim, it follows that once a courtroom deception has occurred no judicial remedy on the claim in suit can respond to the deception or its effects.

The question happens to arise in the context of the deception of another court in a parallel action, but the novel immunity theory below equally hamstrings any corrective response by a court which is itself deceived.[10] Thus, from the standpoint of litigants calculating what they might get away with, the Opinion below teaches that the immunity can permanently protect the poten-

10. The Opinion below reasons that the immunity bars veil-piercing against CMOBC below, precisely because it would also bar that relief in the deceived court itself, had CMOBC been before it (A-31-32). The happenstance of separate forums cannot affect the immunity; it is defined by the nature of the claims it bars, not by choice of forum (*see* pp. 23-25, *infra*). Thus, if the immunity bars corrective veil-piercing here, it must equally bar it where both parent and subsidiary are before one court in one action.

tially large practical results of a temporarily successful deception in preliminary proceedings. In a time of nationwide concern about professional standards and litigation abuses, this weed should be swiftly uprooted.

B. *Federal courts have broad remedial powers to correct the effects of a deception of a court and to disregard corporate entities*: Where a court is imposed upon by deception at the preliminary injunction stage, the deceived court, or any other court which finally adjudicates that cause of action, has and must have broad remedial power to correct the imposition and restore, so far as possible, the position of the aggrieved party. For instance, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944), this Court explained:

> Equitable relief against fraudulent judgments is not of statutory creation. . . . Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by remedial flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.

Indeed, Fed. R. Civ. P. 60(b)(3) expressly empowers federal courts to "relieve a party or his legal representative from a final judgment, order or proceeding for . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic) . . . of an adverse party." No known authority has applied the immunity to defeat or limit these powers.

Both Rule 60(b)(3) and *Hazel-Atlas* address relief from final judgments. *A fortiori*, a court imposed upon at the preliminary injunction stage must have equal or greater remedial flexibility. The strong competing policies protecting the finality of judgments do not apply, because preliminary decisions have no finality. And where the deceived court cannot grant corrective relief, the court where the same cause of action is litigated to finality may surely do so. Here the deceived court is so

disabled, because Chase Jamaica is judgment-proof, CMOBC cannot be sued in Jamaica, and the Jamaican court could not retrospectively undo the sale, made to a bona fide purchaser whose title is protected by a Jamaican statute.[11] *See The Rule Against Civil Actions For Perjury In Administrative Agency Proceedings: A Hobgoblin of Little Minds*, 131 U. Pa. L. Rev. 1208 (1983).

The scope and flexibility of the power to disregard corporate entities is discussed at pp. 14-17, *supra*. The additional point here is that by its very nature, disregard of entities can only affect the scope of the remedy on an underlying cause of action; even the Opinion below recognizes that it "does not, in and of itself, confer any additional substantive rights upon a plaintiff" (A-32). For instance, if the separate entity of Chase Jamaica did not exist at all, CMOBC would directly and wholly own the business of Chase Jamaica, and would be liable on Rose Hall's underlying cause of action under ordinary principles. However, CMOBC owns that business indirectly through the subsidiary, and invokes the immunity called limited liability. *See, e.g.*, Powell, *Parent & Subsidiary Corporations* §1 (1931); 18 C.J.S. *Corporations* §581 (1939) (black letter that limited liability makes parent "immune" unless "this immunity" is disregarded). Dis-

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11. Ordinarily, one aggrieved by the deception of a court must seek relief in the deceived court in the same case, because *res judicata* gives finality to that court's judgment. Here the deceived court (a) made only a preliminary decision having no finality there or elsewhere, *Restatement (2d) Judgments* §§13, 27, and (b) retains no power to grant further relief from the deception, and (c) has already granted the only realistic relief it could, by expressly approving Rose Hall's pursuit of CMOBC under American law in the second forum (*See* p. 6, *supra*). Rose Hall had to seek the corrective veil-piercing remedy in a different forum; Chase Jamaica can be sued only in Jamaica, while CMOBC cannot, so no court has jurisdiction over both. Such happenstances affecting choice of forum do not affect the immunity, which is measured by whether the aggrieved party is trying to make the deception the gist of a new cause of action (*See* pp. 23-25, *infra*).

regarding the entity does not change the cause of action, but only removes this immunity.[12] In this regard, veil-piercing operates like a subsequent merger. If X has a cause of action against subsidiary corporation S, whose existence is later extinguished by merger into P, its parent, there is no new cause of action against P "for merging" — the merger extends a remedy against P on the original cause of action. For instance, one would expect the statute of limitations to run in P's favor from the date of S's wrong, not from the merger — just as one would expect it to run in favor of CMOBC from the date of Chase Jamaica's wrong.

C. *The courtroom immunity does not limit the powers of federal courts to correct courtroom deceptions and to disregard corporate entities*: As the Opinion nowhere denies, the immunity does not purport to limit anyone's becoming liable *because of* courtroom statements; it only protects against "damages liability *for*" such statements, *Briscoe v. Lahue*, *supra*, 460 U.S. at 325, so those protected may speak in judicial proceedings free of a narrow and special fear — the fear of suit on new causes of action against themselves, and perhaps others related to them, *for* courtroom statements. This is not such a suit. Suppose a defendant's courtroom statements estop his assertion of an otherwise valid defense of limitations as to some claim. The statements would thus be "pivotal" to liability on that claim in the "because of" sense mistakenly applied below (A-34-37), but the claim would not be a suit "for" the courtroom statements, and the immunity would not prevent the estoppel as if the statements were

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12. *See, e.g., Bucyrus-Erie Co. v. General Products Corp.*, 643 F.2d 413, 421-22 (6th Cir. 1981) (veil pierced against individual; he is thus "treated as having *assumed the position* of the corporation . . . to the full extent of its obligation"); *Pauley Petroleum, Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. 1968) (entities "may be disregarded and the ultimate party in interest, the parent, be *regarded in law and fact as the sole party* in a particular transaction" — the underlying transaction).

"the gist of [or even "part of"] the cause of action." *A fortiori*, the Opinion was plainly wrong to apply the immunity in that way here; unlike limitations, limited liability is not a complete defense and does not even affect the cause of action, but goes to limiting plaintiff's source of collection. *See, e.g.*, Latty, *Subsidiaries & Affiliated Corporations* 9 (1931) (" 'Separate entity' is merely a way of saying that [plaintiff] is not to look to [stockholders'] general assets").

No known authority ever before applied the immunity to deny judicial power to disregard corporate entities in response to deception of a court. The Opinion below does so, invoking the policy of the immunity "to avoid a multiplicity of actions in which the value or truth of the evidence would be tried over again" (A-28, A-31-32) — a strange policy to invoke in favor of a preliminary ruling, which may be relitigated to finality as a matter of right. Here the real point of that policy favors Rose Hall. Typically, where a court tells a party, "go home, you've lost," the immunity bars that party from trying to evade the finality of the ruling by asserting some new cause of action for courtroom falsehoods. Here, in contrast, the deceived court ruled, "you get no injunction, *because you do have a remedy in damages* on this cause of action." Rose Hall's effort to disregard corporate entities against CMOBC does not seek to evade that, but to fulfill it, and to fulfill the underlying representations about parent company backing. No known authority has applied the immunity to interfere with any such fulfillment, and the people evading the deceived court's decision — thus far successfully — are the people running CMOBC and Chase Jamaica.

The only other immunity policy the Opinion below invokes is "one of the principal purposes of the rule . . . to prevent disgruntled litigants from bringing vexatious suits against witnesses" which, the Opinion reasons, must also immunize those related to witnesses, such as CMOBC (A-28, A-30). However, Rose Hall has sued no

witness and no lawyer, nor has it sued CMOBC "for" anyone's courtroom statements. Assuming the complete truth of Chase Jamaica's presentation to the deceived court, that court's decision already contemplated later litigation of Rose Hall's underlying damage claim to finality. Rose Hall simply seeks to preserve that remedy "for" wrongful sale of its property, by a conventional equitable intervention. This creates no *new* cause of action to be litigated "for" — or even "because of" — the deception, but only a legitimate continuation of the underlying cause of action. There is no new claim to which the immunity policies about multiplicity of actions and vexatious claims can fairly apply.[13]

The Opinion below nevertheless says the issue here is "whether CMOBC can be held liable *for* the alleged fraud" on the court (A-26). This mistaken premise is at the heart of the Opinion; its entire discussion (from A-23 to A-40) is captioned "The existence of a cause of action *for* false testimony in the Jamaican court" (A-23), and it says "one theoretically cannot reach" the issue of piercing the corporate veil against CMOBC, unless there is "a cause of action against [the witness Brown], Chase Jamaica or CMOBC in tort for civil damages arising from the perjured testimony" (A-26). The Opinion below therefore relies wholly upon English and American cases about attempts to assert a tort of courtroom falsehood. It quotes *Marrinan v. Vibart* [1962] 1 All E.R 869, 871, involving a charge of conspiracy in a courtroom falsehood, where the court expressly said that if "the contention were correct that *the gist of the tort* of conspiracy is the conspiratorial agreement alone, *it may be that the plaintiff would*

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13. The immunity prevents the endless chains of suits which could occur, if a party could freely make a purported new cause of action arise like a phoenix from the ashes of defeat on the underlying claim. Since Rose Hall still asserts its underlying claim, and veil-piercing cannot generate litigation beyond the life of that claim (see pp. 20-21, *supra*), Rose Hall's analysis is inherently a one-trip ticket, without risk of such an endless chain.

be entitled to succeed," but held that the immunity barred the claim because the false testimony was there "*an integral part of the tort*" and thus "part of [plaintiff's] cause of action" (A-30-31). Later a higher court, the House of Lords, held that the immunity permits false evidence to be *part of* a cause of action, provided it is not *the gist of* the cause of action, *Roy v. Prior* [1970] 2 All E.R. 729, 733-34 (H.L.):

> The fact that in order to procure the arrest someone (who might or might not be the defendant himself) would have to give evidence on oath . . . does not have the result that an action, if otherwise sustainable, could not be brought. *The gist of the complaint*, where malicious arrest is asserted, is not that some evidence is given. . . .
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> * * *
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> [The immunity] does not involve that an action which is not brought in respect of evidence given in court but abuse of process of court must be defeated *if one step in the course* of the abuse of the process of the court *involved or necessitated the giving of [false] evidence*. . . .

American immunity law follows the English precedents (p. 13, n.4, *supra*) and is the same.[14]

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14. For instance, applications to courts may apparently be part of a larger wrong constituting an antitrust violation. *See California Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14, 517-18 (1972); *Annotation*: 62 ALR Fed. 203, 212-14 (1983). *See also Morgan v. Graham*, 228 F.2d 625, 627-28 (10th Cir. 1956); *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 497 F. Supp. 637, 639 (S.D.N.Y. 1980), *aff'd*, 697 F.2d 287 (2d Cir. 1982); *Frist v. Gallant*, 240 F. Supp. 827, 828-29 (W.D.S.C. 1965); *Robinson v. Missouri Pacific Transport Co.*, 85 F. Supp. 235, 238 (W.D. Ark. 1949). The Opinion reads these cases as allowing only actions for larger fraudulent "schemes" of which perjury was a part (A-37-38), but actions involving a larger wrong amounting to constructive fraud are not different in any way material to the policies of the immunity, and the

Since the immunity of Chase Jamaica's lawyers and witnesses only precludes new and independent causes of action for what they said, and the corrective disregard of entities Rose Hall seeks here involves no new tort at all, and no new or independent cause of action at all, the immunity is simply irrelevant. Thus, the courts below should have taken cognizance of the assurances to the Jamaican court about Chase Jamaica's ongoing solvency, and the deceptive nature of those assurances, for purposes of disregarding the entities.

D. *The assurances to the Jamaican court about Chase Jamaica's ongoing financial responsibility, taken together with the later emptying of Chase Jamaica, make CMOBC's assertion of limited liability still more gravely inequitable*: The district court closed its eyes to the assurances to the Jamaican court, and saw "nothing remotely approaching fraud in a wholly owned subsidiary paying off creditors upon closing its business even thought there is outstanding a contingent claim to be resolved" by litigation (A-40). Despite Rose Hall's argument that the assurances and the stripping should be considered together (A-32-33) *there is not a word in the Opinion about why Chase Jamaica or those who control it could equitably or legitimately do this, after a court had relied on the assurances that Chase Jamaica would remain financially able to pay Rose Hall's claim.*

Rose Hall here uses the 1976 assurances to the Jamaican court as creating circumstances in which the later emptying of Chase Jamaica, and CMOBC's assertion of limited liability are, *taken together*, so inequitable that CMOBC may not assert limited liability. The district court ruled, *sua sponte* and mistakenly, that Rose Hall had waived this argument,[15] and it is not clear whether it also

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Opinion mistakenly disregards the stripping of Chase Jamaica as part of a larger wrong here (A-39-40; *see* pp. 25-30; *infra*).

15. All the court cited were two cases which say a plaintiff, attacking a jury's adverse findings, waived arguments by not making them at the jury instruction stage (A-32-37). This does not apply;

thought its immunity ruling barred this use of the assurances to the Jamaican court.

Not only is the immunity inapplicable here for all the reasons discussed above, but it surely could not bar this approach which uses the assurances to the Jamaican court simply as assurances — treating them as if true, or as if innocently mistaken when made. The jury found they were in fact false and part of a deception, but this cannot make CMOBC's legal position *better* than it would be, had the assurances been true and/or innocently made.

The district court found another ground for refusing to accord any significance to the assurances to the Jamaican court; it focused narrowly on whether CMOBC itself controlled the assurances. Although it articulated no reason why, it treated CMOBC's control of them as an absolute precondition of disregard of the entities (A-51). The jury found that Rose Hall met this supposed requirement; its verdict was that CMOBC controlled the deception of the court, which centered on the assurances. The district court, holding the evidence did not support this, used that as an alternative ground for granting CMOBC judgment n.o.v. (A-51-52). This was based on a narrow item-by-item discussion of evidence, disregarding its cumulative force,[16] and involving an obvious

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Rose Hall's argument did not attack the verdict below but relied on it as given — it was CMOBC which sought judgment notwithstanding the verdict. Rose Hall simply responded to CMOBC's immunity argument by shifting emphasis from the falsity of the assurances given to the Jamaican court, to stress that even if innocently made, those assurances made the subsequent emptying of Chase Jamaica inequitable — all of which was within Paragraph 54 of the Complaint (488-89a) and the Pre-trial Order (475a(4)(5)). To confine a successful plaintiff precisely to a theory held faulty only after trial, refusing the recovery a Rule 49(a) verdict supports under a modest refinement of the theory, is to misunderstand the justice-seeking process of entering judgment on a Rule 49(a) verdict. To do so is, also, to exalt procedure over substance, and to do injustice.

16. Rose Hall has a substantial record to support this verdict, discussed in 23 pages of Rose Hall's briefs to the court of appeals,

misunderstanding of the record.[17]

The district court recognized in another connection that "the record contains substantial evidence of general control of Chase Jamaica by various Chase entities. . . . At first blush this evidence would appear damning" (A-117); the court said "sufficient evidence exists to support a finding of indirect general control" (A-119). Having recognized this, the court had no basis to deny the jury its right to infer that CMOBC controlled the assurances. In fact, CMOBC has *never* submitted evidence, or even argued, that the assurances made to the Jamaican court about parent company backing were unauthorized. To the contrary, when parent company backing was needed in the Jamaican stay proceedings, CMOBC purported to provide it, albeit on a conditioned basis adjudicated to be

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reproduced in the Appendix here (A-166- 90). For example, there was admittedly a "chain of command" whereby Brown, Chase Jamaica's managing director who testified in the Jamaican injunction proceeding, had a "boss," Giberga, who in turn had a "boss," Mason, etc., and, as CMOBC's president conceded, "the practical leadership flows down this chain of command" and "none of this is a matter of by-laws or board of dirctors in terms of who's the boss"(1459a). Rose Hall has had no real appellate review on the point. At argument in the court of appeals nothing was said about CMOBC's involvement in the deception; the panel focused on the immunity, and its questions and comments plainly indicated a view of the immunity adverse to Rose Hall — which, the Opinion says, is dispositive (A-40). That made it unnecessary for a busy court of appeals to decide whether the record supports this part of the verdict. If this Court accepts Argument I, Argument II, or Argument III as presented, this need not be resolved. However, if this becomes dispositive, we do ask the Court to decide it or, in the Court's discretion, to remand it to the court of appeals for decision.

17. For example, the court said, referring to whether CMOBC was involved in the proceedings before the Jamaican Court, "consultation up the [corporate] ladder is pure speculation on plaintiff's part" (A-47). This entirely overlooks a memorandum in evidence showing communications about the defense of the injunction proceeding with personnel, located in the New York office where CMOBC then was, who held positions with CMOBC as well as other Chase entities (3934a).

"worthless" (p. 6, *supra*). Moreover, CMOBC's president testified at trial below that CMOBC "would assist Chase of Jamaica in satisfying a [Rose Hall] judgment" (1407a) and Brown, Chase Jamaica's managing director, who gave the testimony in Jamaica, also testified below that to satisfy a damage judgment "Chase Jamaica would always have the resources to call to Chase Manhattan Bank to assist . . . or to CMOBC . . ." (2168a). Under the circumstances, the jury had every right to infer that the assurances to the Jamaican court about parent company backing were duly authorized by CMOBC.

Moreover, the court had every reason, based on CMOBC's assertions, to hold it liable as a matter of law. As stated in Powell, *Parent & Subsidiary Corporations* 66 (1931), "If the parent corporation, expressly or impliedly, holds itself out as responsible for its subsidiary . . . or if it clothes the subsidiary with apparent, but not real, assets upon which the latter's creditors are entitled to rely, *it* will *be liable*." This veil-piercing principle can apply to assertions made in a judicial setting. Compare judicial estoppel, discussed in *United Virginia Bank v. B.F. Saul Real Estate Inv. Trust*, 641 F.2d 185, 189-90 (4th Cir. 1981).

Finally, this whole issue should not have been treated as determinative. It does not matter whether CMOBC, specifically, controlled the assurances to the Jamaica court, because its own 100% parent, Chase, unquestionably did so. All the people involved in CMOBC and Chase Jamaica were Chase officers, including the two unquestionably involved in the assurances — the witness Brown and his "boss" Giberga. Both were Chase officers with responsibility as to Chase Jamaica,[18] and the deception they accomplished, combined with the later stripping of Chase Jamaica, directly benefited Chase, which thereby

18. Based on the apparent involvement of Giberga in the deception, the Opinion says the jury could properly conclude that another subsidiary in which he held an office, was involved in the deception in the sense the Opinion requires (A-49).

received repayment of millions from Chase Jamaica (See pp. 4-5, *supra*). In such a setting, creditor claims of Chase against Chase Jamaica could not equitably stand ahead of or equal to Rose Hall in the *Pepper v. Litton* "order of payment" (p. 14, *supra*), after a court had relied on express assurances that Chase Jamaica's assets (and its parent's backing) would afford Rose Hall a meaningful damages remedy.[19]

Thus, the Opinion did not have to struggle to find individuals involved in the deception, with titles in CMOBC, because CMOBC's possible lack of control over a deception involving Chase is unimportant. The relevant equities are those of the real owner, Chase, not CMOBC, and any wholly owned Chase entity, including CMOBC, can be the source of collection. *See FMC Finance Corp. v. Murphree*, *supra*. This is so because the problem is collection -- a damaged plaintiff faces an empty entity. The question is whether the nature and gravity of this injustice warrants disregard of artificial entities so plaintiff can collect from the real owners. The nature and gravity of this injustice does not vary by a particle depending on the titles of those involved, or in which specific Chase entities they held titles; the organization of *people* in the Chase chain of command (*see* n. 16, *supra*) created this injustice *through* their management of *multiple* entities.[20] In such a case, when a fed-

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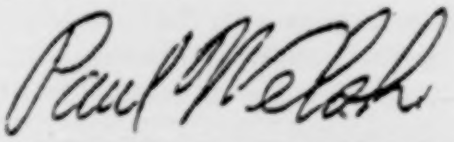
19. This would be so even if no other Chase entities at all were "linked" to Chase Jamaica's assurances. Its affiliates could not *qua* creditor prevent Chase Jamaica from encumbering or disposing of its assets. Chase Jamaica's unilateral assurances, therefore, could create equities in Rose Hall, superior to those of Chase Jamaica's affiliates, and the later stripping of Chase Jamaica grossly violated those equities.

20. There are no competing equities of others having interests in CMOBC. CMOBC is abundantly solvent, and it has no shareholders but Chase. The real ownership of all relevant Chase entities is identical — Chase wholly owns CMOBC, while CMOBC wholly owns Chase Jamaica. It makes no economic difference whether Rose Hall recovers from CMOBC or from either of the others.

eral court looks to the realities to remove an unjust obstacle to collection, it must have power, in appropriate circumstances, to collect through any entity under identical real ownership — involved or not. Otherwise, elaborate structures of entities which separate the assets from the activities could never be pierced, making it simple to place the most extreme abuses beyond all remedy.

Indeed, it was inconsistent with the very concept of disregarding entities for the district court to insist that CMOBC, as an entity, had to take part in the deception of the court — a thought perhaps influenced by the same inapplicable tort concepts which governed its view of the immunity (pp. 22-23, *supra*). After Chase officers committed the deception and Chase received its benefits, neither Chase nor CMOBC — admittedly the wholly owned "vehicle by which Chase Manhattan Bank, N.A. set up a banking business *and ran* a banking business in Jamaica" (1439a) — can equitably assert limited liability, just as this Court held the subsidiary in *Bangor Punta*, *supra*, could not equitably assert its claim in the teeth of its owner's lack of equity.

Respectfully submitted,



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